82-1966

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1982

Anicetas Simutis, individually and as Consul General of Republic of Lithuania at New York, New York

Petitioner

v.

Boris Pranas Daniunas and Augustinas-Vitautas Augustonivich Morkunas

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Questions Presented

1. Whether the imposition and application by the Judiciary Department of Section 2218-(2) of the New York Surrogate's Court Procedure Act, a New York State Statute is such a restriction or modification of Executive Order, (8389, as amended), of the President of the United States and the Regulations of the United States Treasury Department (Foreign Fund Control Regulation 31 CFR-Chapter V Part 520 issued pursuant to the Trading with the Enemy Act of October 1917 set forth in 40 U.S. Stat. 411 section 5(b) that it constitutes an invasion by the Judiciary Department into the exclusive domain of the Executive Department of the Federal Government, a question not heretofore settled by this Court.

2. Whether as a matter of law the doctrine of Res Judicata, as established by this Court over the years to prevent the pernicious effects of uncontrolled litigation has been abrogated to allow, again, the presentation of evidence of a "political act" of a foreign government not recognized by the United States.

3. Whether a Foreign Consul against whom an action may be instituted only in the United States District Court where he resides is subject to the limitation of a State Statute at variance with Federal Law.

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

A. DEFENDANT-APPELLEE:

Anicetas Simutis, individually and as Consul General of the Republic of Lithuania at New York.

B. Plaintiffs-Appellants:

Boris Pravas Daniunas

Augustinas-Vitauts Augustonivich Morkunas.

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and
John C. Fisher

TABLE OF AUTHORITIES

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The petitioner Anicetas Simutis, individually and as Consul General of Lithuania at New York, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 18, 1983.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit and the two opinions of the District Court are set forth in the appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on March 18, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Jurisdiction in Federal District Court

28 U.S.C. 1350-1351 provides:

> "The District Court shall have original jurisdiction, exclusive of the Courts of States, all actions and procedures against Consuls or Vice Consuls of Foreign States," June 25, 1948 c 646, 62 Stat. 936; May 24, 1949, c 139 §80(c) 63 Stat. 101."

CONSTITUTION INVOLVED

The pertinent Constitutional provisions involved are as follows: -

Art. I, Section 10. "No State shall enter into any Treaty, Alliance, or Confederation; * * *."

Art. II, Section 1. "The executive Power shall be vested in a President of the United States of America. * * *."

Art. II, Section 2. "He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; * * *."

Art. VI, para. 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATUTES INVOLVED

Trading with the Enemy Act 40 Stat. 411 Section 5b is set forth on page 4.

Jurisdiction of Federal District Court is set forth on page 2 - 28 U.S.C. 1350-1351.

New York's Surrogates Procedure Act Section 2218-2 is set forth in appendix hereto - page A-6.

Regulations and Related Documents of Foreign Funds Control dated May 19, 1966. Published in booklet form by U.S. Printing Office - 1966-O-222-009.

STATEMENT OF THE CASE

On March 18, 1975 plaintiffs initiated an action in the United States District Court for the Southern District of New York against the defendant individually and as Consul General of Lithuania to recover funds paid to defendant's predecessor, Jonas Budrys ($1002.37 in 1942 and $822.99 in 1945) for a total of $1825.34, by Order of a Maryland Probate Court pursuant to United States Government Treasury Licenses and the Executive Order of the President of the United States (Executive Order 8389, as amended). The licenses directed that the money be placed in the National City Bank of New York in a blocked account of the Consultate General of Lithuania, as trustee.

When the 1942 and 1945 payments were made to Jonas Budrys, the so-called Trading with the Enemy Act, of October 1917 set forth in 40 Stat. 411, was and to this very day is still in effect. It was enacted during World War I when the United States was at war with Germany. Section 5(b) of this Act provides as follows:

> That the President may investigate, regulate, or prohibit under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, export, or earmarking of gold or silver coin or bullion of currency, transfers of credit in any form (other than credits relating solely to transactions to be executed with the United States) and transfers of evidence of indebtedness, or of the ownership of any property between the United States and any foreign country, whether enemy, ally of enemy or otherwise, or between residents of one or more foreign countries, by any person within the United States, and he may require any such person engaged in any such transaction to furnish, under oath, complete information relative thereto, including the production of any books of account, contracts, letters or other papers in connection therewith in the custody or control of such peerson, either before or after such transaction is completed.

As Hitler's Army invaded Europe, and in particular when Lithuania and other Baltic States were invaded, the late President Roosevelt, by virtue of the powers given him by the above Act, issued on April 10, 1940, Executive Order 8389, and Executive Orders 8484 and 8485 amending 8389 (Fed. Reg. Vol. 5 No. 138 July 17, 1940 page 2586).[1]

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1. Executive Order 9989 (C.F.R. 3 page 748) transferred jurisdiction over blocked account to Attorney General and stated "all orders under 8389

On November 18, 1975 the Court ordered the defendant to deposit the sum of $5,598.15 with the Clerk of the Court pending the litigation. Defendant complied with the Court's order on April 19, 1976.

On August 21, 1978, a Hearing was held in District Court (Judge Sweet). Plaintiffs produced no witnesses and relied upon Documentary Evidence secured from Soviet occupied Lithuania.

Plaintiffs' counsel presented its case. The Court overruled defendant's objections to the Powers of Attorney, vital statistic records and reserved decision on a Certificate of Right to Inherit. Court adjourned Hearings to August 28, 1978 with directions to Counsel to submit evidence of Use, Benefit or Control issue and other related matters.

On August 28, 1978, Hearings were concluded before Judge Sweet and Court reserved decision with a further request for Briefs.

On October 18, 1978, Memorandum Opinion of Judge Sweet was issued and filed indicating that plaintiffs claims were dismissed and stated fund in question should

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(cont.)
and 9095 shall continue in full force and effect ..."

be deposited with the Court. However the fund already had been paid to the Clerk of the Court by the defendant on April 19, 1976, under threat of contempt.

On November 2, 1978, defendant's letter to Judge Sweet, with copy to plaintiffs' attorneys, called attention to the prior payment to the Clerk of the Court and enclosed for his ready reference a copy of a letter from United States Treasury Department previously sent to Judge Werker regarding the manner in which the Clerk should hold the fund. Accordingly, he modified his Memorandum Opinion and on November 16, 1978 a Judgment was entered dismissing the action and stated that plaintiffs "take nothing" and that the fund be held by the Clerk of the Court for the "Consulate General of Lithuania, as Trustee and Attorney-in-Fact for Mrs. Aniele Daniuniene, a national of Lithuania" and designated as a blocked account under Executive Order 8389, as amended, and the Regulations of the United States Treasury Department, and that the fund not be released until specific Treasury licenses have been obtained and filed with the Court.

No appeal was taken by plaintiffs from the Court's Judgment and Order filed on November 16, 1978.

On November 13, 1981, defendant filed with the Court the United States Treasury Department's License No. N.Y. 900-666, dated October 20, 1981 which approved the return of the fund to Consulate General's blocked account.

On December 16, 1981, the Court on its own Motion directed the return of the fund to the defendant.

On April 17, 1982 the same plaintiffs in the First Complaint against the same defendant in the First Complaint for the same cause of action in the First Complaint filed with the Court a new Complaint.

Both Complaints in almost identical language stated the action was brought under 28 U.S.C. 1350-1351 which provides

> "The District Court shall have original jurisdiction, exclusive of the Courts of States, all actions and procedures against Consuls or Vice Consuls of Foreign States.", June 25, 1948 c 646, 62 Stat 936; May 24, 1949, c 139 § 80(c) 63 Stat 101.

Both actions demanded the payment to the plaintiff of the same fund in question, namely $1,825.34 in the First Complaint and $5,598.15 in the Second Complaint being the original sum plus accumulated

interest thereon and presently in the blocked account of the defendant.

On May 4, 1982, defendant filed an Answer to Second Complaint being a General Denial and an Affirmative Defense of Res Judicata.

On May 18, 1982 Judge Edelstein directed counsel to meet with him in his chambers on May 25, 1982 for a lawyers' conference.

On May 25, 1982 at the conclusion of the conference, Judge Edelstein directed that a Notice of Motion to Dismiss with supporting affidavits and exhibits be submitted to him forthwith for his judicial determination.

On May 28, 1982 defendants' Motion to dismiss with supporting Affidavit and Exhibits were filed.

On June 24, 1982 and July 9, 1982 plaintiffs' affidavit and reply memorandum of law were filed with the Court.

On October 21, 1982, Judge Edelstein's Memorandum Opinion was filed indicating a grant of the Motion to dismiss with costs and counsel fees to defendant.

On November 9, 1982 upon receipt of defendants affidavits in support of allowances and fees, Judge Edelstein signed an Order of Judgment granting defendant's Motion to Dismiss with allowances of costs and counsel fees.

On December 8, 1982, Plaintiffs appealed to the Second Circuit from the Opinion, Order and Judgment entered on November 9, 1982.

On March 18, 1983, the Second Circuit reversed and remanded for further proceedings the judgment entered on November 9, 1982.

Reasons for Granting the Writ

1. The Second Circuit Court reviewed the Opinion and Judgment of the District Court (Judge Sweet) entered on November 19, 1978 from which no apeal was taken, and the Opinion and Judgment of the District Court (Judge Edelstein) entered on October 19, 1982, from which an appeal was taken, and stated that:

> "Although Judge Sweet ordered that the 'plaintiffs take nothing" his decision was not intended as a ban to a future attempt by the appellants to recover distributions citing several New York State Court decisions and concluded that 'Under New York law res judicata would not bar this renewed attempt by appellants to establish their entitlement to the distribution and to demonstrate use, benefit or control.
>
> Although Judge Edelstein did not cite or refer to New York law in his opinion and despite the Consul general's contention that New York law is not binding on the federal courts, Judge Sweet's invocation of N.Y. Ct. Proc. Act §2218(2) is the law of the case. There is no reason to foreclose appellants from a right they would have enjoyed in the New York State Courts".
>
> On remand appellants will be required to again establish their entitlement to the distribution and to demonstrate that they will have use, benefit or control of the distribution. Although Judge Sweet ruled that a Lithuanian Certificate of Right to Inherit was not conclusive on the exclusive right of Appellants to distribution, the Certificate is evidence to be considered by the District Court."

The Court of Appeals ratified the Order and Judgment of the District Court (Judge Sweet) to deposit the funds "pursuant to Section 2218 of the New York Surrogates' act for the benefit of all those who may hereafter appear to be entitled to same—." However the same District Court (Judge Sweet) had decided that despite extensive litigation the Plaintiffs-Appellants had

failed to prove their entitlement to the fund. The District Court (Judge Sweet) stated:

> "Plaintiff's claims are dismissed. The monies in question should be deposited in this court, with interest thereon at the legal rate of interest for each year in question."
>
> The same District Court (Judge Sweet) modified this holding in a judgment shortly after the opinion as follows:
>
> "It is Ordered and Adjudged that the plaintiffs' claim for the fund—is hereby denied and plaintiffs take nothing, and that this action is hereby dismissed and that the defendant have and recover from the plaintiffs his costs of this action"

However, the Circuit Court in its Opinion (March 18, 1983) ratified the District Court's Order of Deposit (Judge Sweet) with the addendum reference of the New York Statute and stated:

> "In a letter to Appellant's attorney in 1978 the United States Department of Treasury explained that a transfer of blocked funds to the Court is valid and enforceable for the purpose of determining between the parties to the proceeding, rights and liabilities litigated. However no attachment, judgment decree, lien, execution, garishment or other judicial process can confer or create a greater right, power or privilege with respect to or interest in, any property in a blocked account than the owner of such property could create by voluntary act prior to the issuance of an appropriate license."

The letter also had cited Chase Manhattan Bank v. United China Syndicate Ltd., 180 F.Supp. 147, where the following is stated.

> "There is, however, a more potent reason for denying the motion. It appears, without contradiction, that these accounts have been blocked since December 17, 1950, pursuant to the Foreign Assets Control Regulations of the United States Teasury Department in accordance with the provisions of the Trading with the Enemy Act, Tit. 50 U.S.C.A. Apendix, §5. Included with the papers submitted upon the motion is a letter from the Acting Director of the Foreign Assets Control Division of the Treasury Department in which he states that 'the documents in the case tend to indicate that United China Syndicate Ltd., of Shanghai, is the beneficial owner of the accounts.' If this is so it might of course be improper to put the assets in the hands of this corporation or to grant a default judgment for the Hong Kong corporation. Furthermore, the Acting Director of the Foreign Assets Control Division of the Treasury Department said in his letter that 'a Treasury License is required not only for the payment of funds or the delivery of securities from a blocked account, but also that a license is required before any judicial process can affect any property in a blocked account.' This statement of the Acting Director is correct. Title 31 of the Code of Federal Regulations, § 500.504, provides that
>
> > "Judicial proceedings are authorized with respect to property in which on or since the "effective date" there has existed the interest of a designated national.'
>
> But the Regulations provide that that section does not authorize or license

> 'The entry of any judgment or of any decree or order of similar or analagous effect upon any judgment book, minute book, journal or otherwise, or the docketing of any judgment in any docket book, or the filing of any judgment roll or the taking of any other similar or analogous action.'
>
> Such regulations seem to be authorized by the provisions of the Trading with the Enemy Act. Under the circumstances this Court may not direct the entry of any judgment at the present time in the absence of a license permitting such entry of judgment.
>
> The motion for a default judgment is denied. So ordered."

It is apparent from the above letter of the Treasury Department which stated the Federal Law, that the District Court was limited to one and only one action, namely to determine the rights, if any, of the plaintiffs appellants to the fund; denied them as above stated. The added reference to the New York Statute was a definite invasion by the Judiciary into the exclusive function of the Executive Department, in particular Section 520.212(d) of the Foreign Funds Control Regulation in that it conferred or created a greater right, power or privilege in property in a blocked account than the owner of such property could create by voluntary act prior to the issuance of an appropriate license. What

was this greater right? The fact that plaintiff-appellants could again present a claim twice thoroughly litigated and twice denied by the District Court by two different Judges, one of whom called it pernicious litigation.

The Circuit Court also stated in its opinion

> "Judge Sweet's invocation of N.Y. Surr. Ct. Proc. Act Section 2218 (2) is the law of the case. There is no reason to foreclose appellants from a right they would have enjoyed in the New York State Courts".

In addition, the District Court (Judge Sweet) in his opinion directing the application of the New York Statute stated: "Since there is no applicable federal law, this court will apply the law of its situs, New York". This was not correct. The above stated Executive Order of the President of the United States and the Treasury Departments' Foreign Funds Control Regulations and Related Documents clearly set forth the Federal Law to be applied. There is no use, benefit or control regulation. Entitlement to the fund was the condition precedent to the obtainment of the necessary license. Nothing else.

It is important to note at this time that the District Court (Judge Sweet) modified his Memorandum Opinion of October 18, 1978, when his attention was directed by Counsel to the fact that the fund in question

had been previously deposited in Court, pursuant to an Order of the Court. The modification was again made evident when on December 18, 1981 the District Court (Judge Sweet) directed the return of the fund to the defendant after he secured a new Treasury License pursuant to the Court's order, indicating a clear intent to follow the Federal Law, clearly not considered by the Circuit Court.

It was admitted throughout the litigation that the United States government does not admit the forceful incorporation of Lithuania into the Soviet Union. In withholding recognition of Soviet seizure of the Republic of Lithuania, the government of the United States has made a determination of policy which all our courts should follow. Mr. Justice Frankfurter in a concurring opinion in United States v. Pink, 315 U.S. 2031, 2041 (1942) said "Recognition of a foreign country is not a theoretical problem or an exercise in abstract symbolism. It is the assertion of national power directed toward safeguarding and promoting our interests and those of civilization.

Power over external affairs is not shared by the states; it is vested in the national government exclusively.

If state laws and policies did not yield before the exercise of the external powers of the United States, then our foreign policy might be thwarted. These are delicate matters. If state action could defeat or alter our foreign policy, serious consequences might ensue. United States v. Pink, supra.

Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference. Hines v. Davidowitz, 312 U.S. 52 at 63 (1941).

Rules of International Law should not be left to the divergent and sometimes parochial state interpretations. Many questions touching foreign relations uniquely demand singlevoiced statement of the Government's views. Baker v. Carr, 369 U.S. 186, 211 (1962). Foreign policy decisions are delicate, complex, and involve large elements of prophecy. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. C&S Air Lines v. Waterman Corp., 333 U.S. 103, 111 (1948).

Courts are not equipped or competent to make foreign policy, or to judge the impact of their rulings in occasional cases on the vital concern of a nation. Judges have their peculiar duties, which, if faithfully and learnedly studied, have little tendency to make them familiar with current and rapidly changing conditions, upon which depend the important political actions of an unrecognized government.

If the courts, after the political departments have spoken, have the right to take one step in the direction of premature recognition of a government's political action it might thwart our federal government's foreign policy. See Langer, Seizure of Territory 10 (1947).

A court trying to decide an international law case without advice on the political ramifications is as much in the dark as a judge sitting on a libel case without the innuendo required to explain the defamatory connotation of an equivocal published writing. An element essential to decision is missing. Cardoza, Judicial Deference, 48 Cornell L.Q. 461, 498 (1963). This professor also said:

> "* * * When the executive branch has spoken, for example, on the question of recognition of foreign governments or the existence and meaning of treaties, that is the voice of the United States. If the courts do not follow its lead, our country will be heard abroad in confused tones. The problem, then, is once more to reconcile obeisance to the judicial function with the need for harmony when our words are to be heard around the world." (at 467).

It is an axiom of international relations that a sovereign state cannot speak with two voices. For the foreign office to recognize as a sovereign state, or a particular person or group of persons therein as entitled to acts for that community, while the judges denied such recognition, would be an impossible situation. McNair, 1921 Brit. Yb. Int'l. L. 57, 65; Boguslawski and Another v. Gnynia Ameryka Line, 66 Times L.R. 596, 605 (1950) Part 2; The Rogdai, 278 Fed. 294, 296 (D.C. 1921).

In Digest of International Law, prepared by and under the direction of Marjorie M. Whiteman, B.A. LLB., M.P.L., J.S.D., LLD (Hon.), Assistant Legal Advisor, the Department of State, in Volume 2, page 608, the following is stated:

"§ 116. EFFECT OF NON-RECOGNITION ON APPLICATION OF FOREIGN LAW.

Courts in the United States refuse to give the law of an unrecognized entity or regime the effect it otherwise would have under the rules of conflict of law, except as to rules regarding the transfer of property localized at the time of transfer in the territory of the unrecognized entity thereof."

The fund in question at no time either during the lifetime of Aniele Daniuniene or at her death was localized in Soviet occupied Lithuania. By an Executive Order of the President of the United States the money was directed to be placed in a blocked account, subject to regulation of Treasury Department. The reason for placing these and other funds in blocked accounts was to prevent confiscation by either the Germans or the Russians, both of whom had occupied Lithuania without the consent of the Lithuanian people or the Lithuanian Government. Likewise, it can not be held that the fund was nationalzed property. Hence the so-called "Act of State" doctrine can not be applied.

The rule stated in the above section is supported by a substantial number of decisions by both federal and state courts in the United States. Some decisions express it without reservation. The Maret, 145 F.2d 431 (3d Cir.

1944), Ann Dig. 29 (No.9). Latvian State Cargo & Passenger S.S. Line v. McGrath, 188 F.2d 1000 (D.C. Cir.) cert denied 342 U.S. 816 (1951).

The great majority of the courts which have taken a position on the issue have based their opposition to suits by unrecognized government on the theory that to allow an unrecognized government to sue in American courts would overrule the act of the President in withholding recognition, a power which is exclusively his under the Constitution.

In the Denny case, (127 F.2d 404, the Court of Appeals Third Circuit) the rights of American citizens or residents were not involved. In this case Anna Walastkus is an heir and an American citizen residing in Baltimore. The District Court concluded that the entire fund, as stated in the Bill of Complaint, was not the property of the plaintiffs, and the Complaint was dismissed.

However, the fund in question was never in the Surrogate's Court of New York or any New York Court of similar jurisdiction. The fund was always subject to the jurisdiction of the Executive Department namely the Executive Order (8389, as amended) of the President of

the United States, and not any regulation of the Surrogate's Court of New York.

The imposition of the New York Surogate's Act by the District and Circuit Courts was exactly what Justice Douglas in Zschernig v. Miller, 389 U.S. 429 said, — namely that the Probate Court should not establish its own foreign policy. See also Jones v. United States, 137 U.S. 202 at 212, to the same result and effect.

Judge Sweet's Memorandum Opinion was filed on October 18, 1978 and directed Counsel to "Settle Order on Notice." Plaintiff's counsel declined to comply and waited until November 20, 1978 and after the Judgment against plaintiffs was signed and entered before requesting an opportunity to explain their neglectful failure to provide the Court with "Use, benefit or control" evidence requested by the Court.

However, the Court had at that time decided (1) that plaintiff's claim to the fund was based on the Certificate of Right to Inherit which was not evidential stating on page 3 of his Memorandum Opinion: "However, to give recognition to the Certificate of Right as determinative of the rights of all the heirs to the decedent would approach, if not actually reach, a political

act, since it would affect persons and property located in countries other than Lithuania. See generally Zeiss Stiflung, 293 F. Supp. 892, at 900-01. This court cannot deny the reality that Lithuania does not, nor can it feasibly, determine the rights of heirs residing outside its borders. Therefore, its recognition is limited to that which is a private act, that is, to the determination of the heirs residing in Lithuania, and it will not affect this court's ability to recognition to those heirs residing outside of Lithuania and who have satisfied this court as to the validity of their claim." And (2) that plaintiffs had not proven the benefit, use or control issue. The Court stated on pages 5 and 6: "At the conclusion of the trial day on June 20, 1978, this court directed that the issue of whether the plaintiffs will receive the benefit or use or control of the monies from the fund should be addressed when trial was resumed on August 28, 1978, since the defendant had placed this question in issue. Plaintiffs' counsel chose not to address the issue at trial, but did address it in its Additional Memorandum of law. Annexed to this memorandum was an affidavit of the attorney who is the head of the Soviet law firm specializing in the interests of Soviet heirs in estates

pending in other countries, a letter from the Department of State, and copies of certain regulations of "Vnesphosyltorg", the Soviet foreign trade organization. Although these exhibits arguably provide support for the position that the plaintiffs will receive the full use or benefit of the fund, such were not introduced into evidence at trial and cannot be considered by this court.* * * *

"However, the attorney for the plaintiffs has submitted nothing to this court to establish that these particular plaintiffs will be able to control, use, or benefit from the monies in question. Even assuming this court could consider the letter from the Department of State, there has been no showing that these plaintiffs are so physically located, or otherwise capable of taking advantage of the monies, so as to make purchases through "Vnesphosyltorg".

"Whether or not these plaintiffs will receive the use or benefit or control of the monies is a question of fact, not of law. Even if the cases cited by counsel for the plaintiffs satisfied this court that Soviet citizens generally have in the past received the use or benefit or control of foreign monies distributed to them, counsel

has submitted nothing to this court establishing the continuation of this practice or that it will applied to these Lithuanian plaintiffs."

Federal Civil Procedure provides that matters not introduced in evidence at the trial cannot be considered by the Court. (Key 1951)

The conduct of foreign affairs is a function of the executive branch of government and the judicial branch has no part in it. See Latvian State Cargo-Passenger Line v. McGrath, 188 Fed. 2d 1000.

The Executive Department on two occasions ordered that the funds be placed in a blocked account pursuant to the Executive Order of the President of the United States.

The imposition or addendum of the New York Statute was a violation of constitutional law. In addition the fund was never in the actual possession of the Lithuanian government. It was the property of a Lithuanian National, namely Aniele Daniuniene and placed in a blocked account by the Executive Department of the United States government, under its control and not subject to any state law. See The Maret, 145 F.2d 431,

at 442, and further set forth herein, under Res Judicata question.

Question 2. Res Judicata

Plaintiff-appellants contended and the Circuit Court agreed that the doctrine of Res Judicata is not applicable to the facts and law under New York's Surrogate Court Procedure Section 2218. And hence the plaintiffs-appellants should be permitted to supply evidence of the benefit, use or control of a fund to which the District Court had denied on two occasions their rights to claim same as sole heirs.

Whether the plaintiffs-appellants would have the benefit, use or control of the fund in question was an objection by the defendant to the offer in evidence of the Certificate of Right to Inherit. The Court was open-minded and directed that evidence be produced by both counsel at the next hearing date. Defendant's efforts to secure information from the Soviet Union was and is practically nil. On the other hand, plaintiffs-appellants can secure any information desired, e.g., the affidavit of the Soviet official which they submitted with the briefs filed with Court. However, the Court could not consider evidence in a brief that was not submitted at

the trial. Nevertheless, the issue was raised, considered and adjudicated against the plaintiffs and therefore Res Judicata.

The Cause of Action asserted in the Complaint dismissed in 1978 was the same Cause of Action that was asserted in the Complaint herein on April 17, 1982.

Both Complaints asserted in identical language that the action was brought under the same section of the same statute, 28 U.S.C. 1350-1351.

Both complaints set forth the same plaintiffs, the same defendants, the same cause of action, the same claim for the same fund, with the exception of the amount of the fund increased because of interest.

In dismissing the Complaint in the second suit, the District Court Judge Edelstein said in his opinion:

> "This suit is clearly res judicata; nothing has changed from the prior case heard by Judge Sweet. Indeed, as the court has investigated the matter, it has found the current suit to be identical to the case heard by Judge Sweet. Even the issues that customarily arise in these cases — was the matter concluded against the parties at bar, was the case fairly litigated, were the issues sufficiently similar, etc. . . . do not arise here. There is no basis whatsoever that the plaintiffs offer with which they might support the filing of a new suit in this matter."

> The basis for plaintiffs' claim to the fund in both complaints was the Certificate of Right to Inherit which indicated that plaintiffs were the sole heirs of the decedent, Aniele Daniuniene.

The Court in the first suit emphatically denied the claim, and ordered that "Plaintiffs take nothing."

Clearly this issue, namely the claim of the sole heirs, was considered and adjudicated against the plaintiffs and in favor of defendant. Judge Sweet had reserved decision on the admissibility of the Certificate to Inherit and both counsel supplied exhaustive legal briefs for the Court's consideration, clearly an indication that the issue was thoroughly considered by Judge Sweet who cited legal precedents and decided cases to support his decision.

Likewise, the benefit, use or control aspect also was completely considered by the Court and resolved against the plaintiffs.

In Glick v. Ballentine Produce, Inc., 397 F.2d 590 (1968), United States Court of Appeals, Eighth Circuit, Senior Circuit Court Judge Vogel in a decision reversing a lower court ruling stated at page 593.

This Court, in Engelhardt d/b/a Engelhardts Camera Store v. Bell & Howell Co., 8 Cir. 1964, 327 F.2d 30, 32, said:

> "The law of res judicata as it relates to claim preclusion is firmly established. In a subsequent action by the same parties, a judgment on the merits in a former action based upon the same cause of action precludes relief on the grounds of Res Judicata. The Judgment is conclusive, not only as to matters which were decided, but also as to all matters which might have been decided."

He then cited other cases in point and concluded:

"It would clearly appear that the Plaintiffs present suit could properly have been dismissed as res judicata."

As above stated all the issues were completely raised and considered by the Court, adversely to plaintiffs-appellants.

The District Court (Judge Edelstein) in the second suit was extremely critical of plaintiff's counsel and stated as follows:

> "The plaintiffs have thus imposed upon the defendant and upon the court. They have forced the defendant to waste money answering this frivolous suit. They have forced the court to expend valuable judicial time and resources including retrieving, from deep storage, the file of a case already decided and closed.
>
> This court has a responsibility to prevent pernicious effects of uncontrolled litigation by criticizing and penalizing it wherever and whenever it arises.
>
> . . . . Furthermore, attorneys have a duty, in the first instance, to review and filter their clients' claims and not bring every frivolous claim into court."

The Circuit Court overlooked this aspect, a matter with which this Court is presently concerned and critical.

The District Court (Judge Edelstein) quoted Gerstle v. Gamble Skogmo Inc., 478 F.2d 1281 at 1309, which stated the Federal Courts have long possessed the equitable power to award counsel fees when justice requires, citing 82 S. Ct. 997 which held counsel fees is "part of the historic equity jurisdiction."

Circumstances of appeal, including claimed bad faith and harassment may justify double costs in Court of Appeals. Federal Rules of Appellate Procedure Rule 38, 28 U.S.C.A. 1912.

Grubb v. Public Utilities Commission of Ohio et al., 281 U.S. 470 at 479, holds:

> ". . . an appellant must abide by the rule that a judgment upon the merits in one suit is res judicata in another where the parties and the subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted but also as respects any other matter which might have been presented to that end."

In Reed v. Allen, 286 U.S. 191, the following is stated at page 199 with reference to a decision in Dupont Bank v. Frankfort, 191 U.S. 499, where Mr. Justice Day speaking for the court said (pp. 510-511):

> ". . . when a plea of res judicata is interposed based upon a former judgment between the parties, the question is not what were the reasons upon which the judgment proceeded, but what was the judgment itself, was it within the jurisdiction of the court, between the same parties, and is it still in force and effect? The doctrine of estoppel by judgment is founded upon the proposition that all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered which in its terms embodied a statement of the rights of the parties. It would undermine the foundation of the principle upon which it is based if the court might inquire into and revise the reasons which led this court to make the judgment. . ."

In a leading adjudicated case in this Court, Southern Pacific Railroad Company v. United States, 168 U.S. 1, the following is stated at page 2:

> "A right, question of fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken conclusively established, so long as the judgment in the first suit remains unmodified."

In Angel v. Bullington, 330 U.S. 183, in an opinion by Mr. Justice Frankfurter, the following is stated at page 190:

> "The 'merits' of a claim are disposed of when it is refused enforcement. If an asserted federal claim is denied enforcement on a professed local ground, but a so-called local ground which is subject to review here because it is in fact the adjudication of a federal question, then the 'merits' of that claim were adjudicated in the only sense that adjudication of the'merits' is relevant to the principles of res judicata. A State court cannot sterilize federal claims by putting on the adjudication a local label."

This is exactly the situation in the instant case. The federal question - Executive Order of the President of the United States and the Treasury Department

Regulations or the adjudication by the Circuit Court and District Court affixing the New York Surrogates Court Procedure Act, a local label.

Mr. Justice Frankfurter also stated at the bottom of page 192:

> "The doctrine of res judicata reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to a conclusion. Compare e.g. Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238, 244. And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties. Chicot County Dist. v. Bank, 308 U.S. 371.

The above case was quoted by Mr. Justice Douglas in United States v. Munsingwear, Inc., 340 U.S. pg. 36 and reiterates the same classic statement of the rule of res judicata.

The Circuit Court's opinion stated that Judge Sweet did not decide that appellants (plaintiffs below) were not the rightful heirs and that he dismissed the case because of insufficient proof of "use or control or benefit" of the distribution. The appellants (plaintiffs below) relied upon the Certificate of Right to Inherit, a Soviet political inadmissible document, which Judge Sweet decided was a "political act" in contra distinction

to the power of attorney which was a "private act." He concluded they were not the rightful heirs, and he ordered that they take nothing. He also elaborated considerably concerning "use or control or benefit" and clearly ruled against them on this issue, matters which Judge Edelstein readily and rightfully agreed were res judicata.

The Circuit Court also said (Appendix p. A-3)

> "Judge Sweet may well have believed that appellants would return to the District Court with sufficient evidence to establish use or benefit or control, and that upon making this showing they would obtain the necessary Treasury license to withdraw the fund."

However, in order to obtain the license, they would have to prove entitlement to the fund. As above stated they failed to do so. The Treasury Department had set forth the District Court's sole function, namely to decide entitlement, nothing else. Since they had no legitimate claim to the fund, they could not obtain a license. It is simply impossible to prove use, benefit or control of a fund to which you have no claim or entitlement.

There was no evidence before the Court that the fund would escheat to the United States. The Treasury Department licensed the return of the fund to the Consul General's blocked account because it was the property

since 1950 of a Lithuanian National who was represented by the Consul General by virtue of a power of attorney and it should remain there pursuant to the Executive Order of the President of the United States.

CONCLUSION

The Second Circuit Court's opinion has cast considerable doubt on the previous judgments of the District Court. While no appeal was taken by plaintiffs-appellants from the first judgment within the time limits of the rules of court, it nevertheless ordered a remand on an issue thoroughly litigated and which the District Court in the second suit decided was not only considered and adjudicated, but also was considered frivolous and caused harassment to the defendant. The Circuit Court failed to recognize not only the modification of the District Court (Judge Sweet) memorandum opinion by the Judgment Order entered after receipt of the Treasury Department's letter indicating the manner in which the Clerk of the Court should hold the fund, but also the fact that Judge Sweet, on his own motion ordered that the fund be returned to the blocked account of the Consul General. Both of these were issues which the District

Court (Judge Edelstein) considered were correct and justified.

In addition to the above the District Court (Judge Sweet) and the Circuit Court by affixing the New York Surrogates Court Procedure Act clearly placed a local label tainting the Executive Order of the President of the United States, an action clearly violative of the United States Constitution. For the reasons stated herein, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit in this action.

Dated May 31, 1983

Richard J. Tarrant

Richard J. Tarrant
Attorney for Petitioner
Anicetas Simutis,
individually and as Consul General
of Lithuania

No. 82-7932

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

BORIS PRANAS DANIUNAS and AUGUSTINAS-VITAUTAS AUGUSTONIVICH MORKUNAS, Plaintiffs-Appellants, v. ANICETAS SIMUTIS, individually and as Consul General of Republic of Lithuania at New York, New York, Defendant-Appellee.	)	Docket No. 82-7932

Decided March 18, 1983.

Appeal from a judgment of the United States District Court for the Southern District of New York, Edelstein, J., granting defendant-appellee's motion to dismiss plaintiffs' complaint as res judicata and awarding sua sponte attorney's fees to the defendant. Reversed and remanded for further proceedings.

PRESENT: HONORABLE WALTER R. MANSFIELD
HONORABLE THOMAS J. MESKILL,
HONORABLE JON O. NEWMAN,

Circuit Judges.

Contrary to the Consul General's argument, Judge Sweet did not decide in the prior case that appellants were not the rightful heirs to the distribution held by the Consul General as trustee. He dismissed the case because of insufficient proof that the appellants would

have "use or control or benefit" of the distribution. 481 F.Supp. at 136. Consequently, Judge Sweet ordered the fund retained by the district court pursuant to N.Y. Surr. Ct. Proc. Act § 2218(2). Although Judge Sweet ordered that the "plaintiffs take nothing," J. App. at 15, his decision was not intended as a bar to a future attempt by the appellants herein to recover the distribution. Several New York courts have held that where beneficiaries would not have the benefit or use or control of an inheritance, the court should withhold the money and that such action by the court would not bar a subsequent attempt to collect the money whenever it appeared that the beneficiaries would receive the benefit, use or control of the inheritance. See, e.g., In re Harmoza's Kraszewski's Estate, 55 Misc.2d 10, 284 N.Y.S.2d 194, 196 (Surr. Ct. 1967). Under New York law res judicata would not bar this renewed attempt by appellants to establish their entitlement to the distribution and to demonstrate use, benefit or control.

In a letter to appellants' attorney in 1978 the United States Department of the Treasury explained that a transfer of blocked funds to the court is "valid and enforceable for the purpose of determining between the parties to the proceeding rights and liabilities litigated[;] . . . no judgment or order may effect a transfer of, or payment out of, a blocked account without a Treasury license." J. App. at 21. Accordingly, Judge Sweet ordered the distribution deposited with the court

> pursuant to Section 2218 of the New York Surrogate's Court Act for the benefit of all those who may hereafter appear to be entitled to same, provided, however, that the fund be held by the Clerk of the Court for the "Consulate General of Lithuania, as Trustee and Attorney-in-fact for Mrs. Aniele Daniuniene, a national of Lithuania" and designated as a blocked account under Executive Order 8389, as amended, and the Regulations of the United States Treasury Department, and that the fund not be released until specific United States Treasury licenses have been obtained and filed with the Court.

Judge Sweet may well have believed that appellants would return to the district court with sufficient evidence to establish use or benefit or control, and that upon making this showing they would obtain the necessary Treasury license to withdraw the fund. Although Judge Sweet released the fund three years later to the Consul General, there is no evidence that the distribution has been abandoned. Cf. Carrera v. United States, 41 A.D.2d 732, 342 N.Y.S.2d 1, 2 (App. Div. 1973) (estate on deposit with court escheats to United States when deemed abandoned). Nevertheless, the fact that the fund has been returned to the Consul General is no obstacle to further proceedings on remand because the district court can again order that the fund be transferred to the district court pursuant to section 2218(2). The claim of Anna Walatkus does not present an obstacle either because she can intervene in the proceeding on remand.

Although Judge Edelstein did not cite or refer to New York law in his opinion and despite the Consul General's contention that New York law is not binding on the federal courts, Judge Sweet's invocation of N.Y. Surr. Ct. Proc. Act § 2218(2) is the law of the case. There is no reason to foreclose appellants from a right they would have enjoyed in the New York state courts.

On remand appellants will be required to again establish their entitlement to the distribution and to demonstrate that they will have the use or benefit or control of the distribution. Although Judge Sweet ruled that a Lithuanian Certificate of Right to Inherit was not conclusive on the exclusive right of appellants to the distribution, the certificate is evidence to be considered by the district court.

Accordingly, because res judicata does not bar a subsequent attempt to demonstrate use or benefit or control and attorney's fees should not have been granted to the appellee, judgment is reversed and this matter is remanded to the district court for further proceedings. Since our decision is based in part on Judge Sweet's order, the district court may wish to decide whether it might not be appropriate to refer the case to him.

Reversed and Remanded

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BORIS PRANAS DANIUNAS and AUGUSTINAS-VITAUTAS AUGUSTONIVICH MORKUNAS,	)	75 Civil 1337 (R.W.S.)
Plaintiffs	)	
-against-	)	
ANICETAS SIMUTIS, individually and as Consul General of the Republic of Lithuania at New York	)	JUDGMENT
Defendant	)	

This action came on for Hearings before the Court, Honorable Robert W. Sweet, District Judge, presiding, and the issues having been duly heard and a decision having been rendered,

It is ORDERED and ADJUDGED that the plaintiffs' claim for the fund (originally obtained by the defendant's predecessor from the Maryland Court as the result of a Treasury license directing that same be placed into the National City Bank of New York for credit to the blocked account of the Consulate General of Lithuania, as Trustee, a checking account, and subsequently paid by the defendant to the Clerk of this Court to the credit of this action under threat of contempt of the Court's Order of November 14, 1975, directing payment of $5,598.15, being principal and interest on the fund in question) is hereby denied and that the plaintiffs take nothing, and that this action is hereby dismissed and that the defendant have and recover from the plaintiffs his costs in this action.

And it is FURTHER ORDERED and ADJUDGED that the defendant be charged with the payment of interest on the fund even though same was not determined to be the law of the case by said Order of November 14, 1975, and that the entire sum be retained by this Court pursuant to Section 2218 of the New York Surrogate's Court Act for the benefit of all those who may hereafter appear to be entitled to same, provided, however, that the fund be held by the Clerk of the Court for the "Consulate General of Lithuania, as Trustee and Attorney-in-fact for Mrs. Aniele Daniuniene, a national of Lithuania" and designated as a blocked account under Executive Order 8389, as amended, and the Regulations of the United States Treasury Department, and that the fund not be released until specific United States Treasury licenses have been obtained and filed with the Court.

Dated: November 15, 1978

Robert W. Sweet
Judge of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BORIS PRANAS DANIUNAS and AUGUSTINAS-VITAUTAS AUGUSTONIVICH MORKUNAS,	Memorandum Opinion 82 Civ. 2210 (DNE)
Plaintiffs	
-against-	
ANICETAS SIMUTIS, individually and as Consul General of the Republic of Lithuania at New York	
Defendant	

EDELSTEIN, District Judge,

This case began years ago with a litigation over a fund that was held by the Consul General of Lithuania, who had been appointed by the regime that governed Lithuania before the Soviet Union annexed that territory. The fund came from the estate of John Daniunas, who died intestate in 1931. The sole heir of Daniunas was Aniele Daniuniene, who died intestate in Lithuania. Certain of the monies from her estate were paid to Jonas Budrys, Consul General of Lithuania and predecessor to the present defendant, who deposited this money in a non-interest bearing account. The money, $1,825.34, was claimed by the plaintiffs here in an action in this court before Judge Sweet more than four years ago. The plaintiffs, the son and grandson of Aniele Daniuniene, are residents of Lithuania. They were represented in the case before Judge Sweet, and are represented in this case, by the firm Wolf, Popper, Ross, Wolf & Jones, found by Judge Sweet to be the plaintiffs' attorney in-fact, pursuant to a valid power of attorney. Before Judge Sweet, and before this court, the

plaintiffs have claimed they are the sole heirs of Aniele Daniuniene and are entitled to the fund.

Judge Sweet found the suit over the fund in his court to be a hard fought litigation. All sides were represented by counsel. All the parties before the court in the case at bar presented their arguments to Judge Sweet four years ago. In an Opinion, Judge Sweet wrote, "Plaintiffs' claims are dismissed. The monies in question should be deposited in this court, with interest thereon at the legal rate of interest for each year in question." Daniunas v. Simutis, No. 75 Civ. 1337 (S.D.N.Y. filed Oct. 20, 1978), p. 8.

Judge Sweet elaborated on this holding in a judgment shortly after the opinion. "It is ORDERED and ADJUDGED that the plaintiffs' claim for the fund . . . is hereby denied and the plaintiffs take nothing, and that this action is hereby dismissed and that the defendant have and recover from the plaintiffs his costs in this action." Daniunas v. Simutis, No. 75 Civ. 1337 (S.D.N.Y. Nov. 16, 1978) (judgment) p. 1. Judge Sweet ordered that the money be held by the clerk of the court for any future plaintiffs who had a right to take it.

This past year the defendant applied to Judge Sweet to remove the funds from the deposit with the clerk of the court and to turn them over to the defendant, Anicetas Simutis, as trustee for the deceased Aniele Daniuniene. Judge Sweet signed an order to this effect: "Ordered that . . . the clerk of this court pay out of the registry of this court the sum of $5,598.15 to Anicetas Simutis, Consul General of Lithuania as trustee and attorney in-fact for Mrs. Aniele Daniuniene." Daniunas v. Simutis, No. 75 Civ. 1337 (S.D.N.Y. Dec. 16, 1981) (order).

The same plaintiffs who brought the case decided by Judge Sweet have now returned to the same district court to bring another suit against the same defendant, asserting a claim to the same fund; and this claim is grounded on the same facts and arguments as was the former claim.

The defendant has filed a motion to dismiss arguing that the decision of Judge Sweet is res judicata in the case currently at bar.

This suit is clearly res judicata; nothing has changed from the prior case heard by Judge Sweet. Indeed, as the court has investigated the matter, it has found the current suit to be identical to the case heard by Judge Sweet. Even the issues that customarily arise in these cases—was the matter concluded against the parties at bar, was the case fairly litigated, were the issues sufficiently similar, etc.—do not arise here. There is no basis whatsoever that the plaintiffs offer with which they might support the filing of a new suit in this matter.[1]

The plaintiffs have thus imposed upon the defendant and upon the court. They have forced the defendant to waste money answering this frivolous suit. They have forced the court to expend valuable judicial time and resources including retrieving, from deep storage, the file of a case already decided and closed.

This court has a responsibility to prevent the pernicious effects of uncontrolled litigation by criticizing and penalizing it wherever and whenever it arises. Particularly under the current case overload, such frivolous cases, by consuming valuable court resources, impede this court from rendering justice to those parties who rightly demand judicial assistance. That situation is unacceptable. Furthermore, attorneys have a duty, in the first instance, to review and filter their clients claims and not bring every frivolous claim into court. Therefore, in order to do justice to the defendants—who fairly litigated this matter, received a decision and have now been harassed by this suit—and in order to preserve the machinery of justice for those who need it, this court orders the counsel for the plaintiffs to pay the reasonable costs of this action including attorney's fees to the defendants.

Courts may award attorney's fees for bad faith or even for dilatory tactics. "Federal courts have long possessed the equitable power to award counsel fees when justice requires." (Emphasis added.) Garstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1309 (2d Cir. 1973). Indeed, in an extreme case, the

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1. Plaintiffs probably do not even make allegations that might support a motion under Fed. R. Civ. Pro. 60. The court, however, makes no finding on this issue because it is not before the court at this time.

Court of Appeals awarded double costs and, in addition, damages to be paid by the attorneys for the party at fault. Browning Debenture Holders' Committee v. Dasa Corporation, 605 F.2d 35, 40-1 (2d Cir. 1978). In the case at bar the court acts in the interest of justice on its own motion to award attorney's fees to the defendant. Settle order.

Dated: New York, New York
October 19, 1982

David N. Edelstein
U.S.D.J.

UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF NEW YORK

BORIS PRANAS DANIUNAS and AUGUSTINAS-VITAUTAS AUGUSTONIVICH MORKUNAS, Plaintiffs -against- ANICETAS SIMUTIS, individually and as Consul General of the Republic of Lithuania at New York, New York Defendant	Civil Action File No. 82 CIV 2210 Judge Edelstein ORDER OF DISMISSAL AND JUDGMENT #82,1505

Defendant, Anicetas Simutis, individually and as Consul General of Lithuania by his attorney having moved to dismiss the complaint herein on the ground that plaintiffs' issues and claims as alleged, are res judicata (failure to state a clim upon which relief can be granted), and all the parties having appeared, memoranda of facts and law having been filed, and a Memorandum opinion having been issued and filed, it is:

Ordered that Defendant's Motion to Dismiss be granted, and it is

Further Ordered that the law firm of Wolf, Popper, Ross, Wolf & Jones, Attorneys for the Plaintiffs, pay the sum of $46.15 to Anicetas Simutis, the defendant herein for his reasonable incurred costs, plus the sum of $2,675.00 for payment of his Attorney's Fees; and it is

Further Ordered that the Memorandum Opinion filed October 21, 1982 in this action be and the same

is hereby incorporated into this Judgment as if specifically stated herein.

Dated: New York, New York
October 19, 1982

David N. Edelstein
United States District Court Judge

License No. NY-900,666
Date: October 28, 1981

L I C E N S E

(GRANTED UNDER THE AUTHORITY OF SECTION 5(b) OF THE TRADING WITH THE ENEMY ACT, AS AMENDED, EXECUTIVE ORDER NO. 8389 OF APRIL 10, 1940, AS AMENDED, EXECUTIVE ORDER NO. 9989 OF AUGUST 20, 1948, EXECUTIVE ORDER 11281 OF MAY 13, 1966, AND PART 520, CHAPTER V, SUBTITLE B OF TITLE 31 OF THE CODE OF FEDERAL REGULATIONS)

To Anicetas Simutis, Counsul General of Lithuania
41 West 82nd Street
New York, New York 10024

Sirs:

1. Pursuant to your application of June 11, 1981, the following transaction is hereby licensed:

> Approved for the return of $5,598.15 now held in U.S. District Court (Southern District of New York) docket 75 CIV 1337 to the blocked account in the name of the Consul General of Lituania, as trustee, as a national of Lituania.

2. This license is granted upon the statements and representations made in your application, or otherwise filed with or made to the Treasury Department as a supplement to your application, and is subject to the conditions, among others, that you will comply in all respects with all regulations, rulings, orders and instructions issued by the Secretary of the Treasury under the authority of seciton 5(b) of the Trading with the enemy Act, as amended, and the terms of this license.

3. The licensee shall furnish and make available for inspection any relevant information, records or

reports requested by the Secretary of the Treasury, the Federal Reserve Bank of New York, or any other duly authorized officer or agency.

4. This license expires December 31, 1981, is not transferable, is subject to the provisions of Chapter V, Subtitle B of Title 31 of the Code of Federal Regulations, and any regulations and rulings issued pursuant thereto and may be revoked or modified at any time in the discretion of the Secretary of the Treasury acting directly or through the agency through which the license was issued, or any other agency designated by the Secretary of the Treasury. If this license was issued as a result of willful misrepresentation on the part of the applicant or his duly authorized agent, it may, in the discretion of the Secretary of the Treasury, be declared void from the date of its issuance, or from any other date.

Issued by direciton and on behalf of the Secretary of the Treasury:

FOREIGN ASSETS CONTROL
By Federal Reserve Bank of New York

per pro M. M. Girschick
M. M. Girschick (Mrs.)

The Act of October 6, 1917, as amended, provides in part as follows:

> ". . . Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished bya like fine, imprisonment or both."

In 1975, New York's Surrogate Court Procedure Act Section 2218 read as follows:

> "SECTION 2218. DEPOSIT IN COURT FOR BENEFIT OF LEGATEE, DISTRIBUTEE OR BENEFICIARY.
> (1)(a) Where it shall appear that an alien legatee, distributee or beneficiary is domiciled or resident within a country to which checks or warrants drawn against funds of the United States may not be transmitted by reason of any executive order, regulation or similar determination of the United States government or any department or agency thereof, the court shall direct that the money or property to which such alien would otherwise be entitled shall be paid into court for the benefit of said alien or the person or persons who thereafter may appear to be entitled thereto. The money or property so paid into court shall be paid out only upon order of the surrogate or pursuant to the order or judgment of a court of competent jurisdiction.
>
> (b) Any assignment of a fund which is required to be deposited pursuant to the provisions of paragraph one(a) of this section shall not be effective to confer upon the assignee any greater right to the delivery of the fund than the assignor would otherwise enjoy.
>
> (2) Where it shall appear that a beneficiary would not have the benefit or use or control of the money or other property due him or where other special circumstances make it desirable that such payment should be withheld the decree may direct that such money or property be paid into court for the benefit of the beneficiary or the person or persons who may thereafter appear entitled thereto. The money or property so paid into court shall be paid

out only upon order of the court or pursuant to the order or judgment of a court of competent jurisdiction.

(3) In any such proceeding where it is uncertain that an alilen beneficiary or fiduciary not residing within the United States, the District of Columbia, the Commonwealth of Puerto Rico or a territory or possession of the United States would have the benefit or use or control of the money or property due him the burden of proving that the alien beneficiary will receive the benefit or use or control of the money or property due him shall be upon him or the person claiming from, through or under him."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BORIS PRANAS DANIUNAS and AUGUSTINAS-VITAUTAS AUGUSTINOVICH MORKUNAS,

Plaintiffs,

-against-

ANICETAS SIMUTIS, individually and as Consul General of the Republic of Lithuania at New York,

Defendant.

75 Civ. 1337 (RWS)

#47764

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S W E E T, D. J.

This is a hard fought litigation over a fund presently held by the Consul General of Lithuania, duly appointed by the regime that was in authority prior to the annexation of Lithuania by the Union of Soviet Socialist Republics ("USSR"), an act which to date remains unrecognized by our Government. The fund results from the administration of the estate of John Daniunas, who died intestate in 1931 in Maryland. The sole heir of John Daniunas was Aniele Daniuniene, who died intestate in Lithuania. Certain of the monies from her estate were paid to Jonas Budrys ("Budrys"), Consul General of Lithuania and predecessor to the present defendant, who deposited these monies in a non-interest bearing account. Such monies, totalling $1,825.34, comprise the fund which is the subject of this action. The claimants to the fund, the plaintiffs, are Lithuanian residents who are represented by their attorney in fact pursuant to a power of attorney (see discussion infra). Jurisdiction of this court derives from 28 U.S.C. § 1351[1] and the principle that

> [F]ederal courts of equity have jurisdiction to entertain suits "in favor of creditors, legatees and heirs" and other claimants against a decedent's estate "to establish their claims" so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate....

Markham v. Allen, 326 U.S. 490, 494 (1946).

The defenses of Statute of Limitations and laches are not available to the defendant. The defendant has admitted that his capacity vis a vis the fund in question was that of a fiduciary. (Defendant's Memorandum of April 30, 1978 at 7). Thus, the period of limitations "does not begin to run until the administrator has

openly repudiated his obligation to administer the estate. (citations omitted)." In Re Estate of Barabash, 31 N.Y. 2d 76, 80; 334 N.Y.S. 2d 890 (1972). The letter dated September 6, 1968 cannot be considered an act of repudiation; there being no other alleged act of repudiation, the State of Limitations never commenced to run. Id. Similarly, absent repudiation, the defense of laches is also unavailable. Id. at 83. Furthermore, defendant has asserted no prejudice due to the delay.

The defense that the defendant is immune from suit is no longer available. Such assertion was exhaustively dealt with, and denied, by the /Honorable Henry F./ Werker in his decision dated June 30, 1975. This decision is the law of this case and will not be disturbed.

This suit is being prosecuted on behalf of the plaintiffs pursuant to a power of attorney issued to the attorneys for the plaintiffs. Defendant has placed in issue this court's authority to recognize these powers of attorney and the validity thereof. In Matter of Bilinis, 55 Misc. 2d 191, 284 N.Y.S. 2d 819 (Sup. Ct. N.Y.C. 1967), aff'd., 292 N.Y.S. 2d 363 (1968), where the facts were strikingly similar to the case sub judice, the court recognized the powers of attorney. Even though the present government of Lithuania is not recognized by this country, since the powers of attorney relate to what has been determined to be solely a private, local and domestic matter, the inheritance rights of Lithuanian citizens, they will be given effect by the courts of this country. Id.; Carl Zeiss Stiflung v. V.E.B. Carl Zeiss, Jena, 293 F.Supp. 892, 900 (S.D.N.Y. 1968), modified on other grounds, 433 F.2d 686 (2d Cir. 1970). Although defendant has also attacked the validity of the powers of attorney, he has not carried the burden of

establishing that their execution was the product of duress or non-comprehension. Therefore, this court will give recognition to the powers of attorney in question.

The claimants to the fund have presented to this court, through their attorney in fact, in proper form, a duly authenticated Certificate of Right to Inherit ("Certificate of Right") issued by the present Lithuanian government, which in turn has been authenticated by the appropriate official of the USSR. This certificate provides that the sole heirs of Aniele Daniuniene are her son and grandson, the plaintiffs here. The claim of the plaintiffs is resisted by the defendant on the grounds that the Certificate of Right is not properly authenticated and that this court may not rely upon the act of an unrecognized sovereign.

A review of the documents submitted has satisfied this court that the Certificate of Right was properly authenticated in accordance with the laws of Lithuania. The authorities of the plaintiffs are persuasive as to the recognition to be given a private, as opposed to /(a)/ political act of an unrecognized sovereign. In Re Luberg's Estate, 19 App. Div. 2d 370, 243 N.Y.S. 2d 747 (1st Dept. 1963); see generally Upright v. Mercury Business Machines Co., 13 App. Div. 36, 213 N.Y.S. 2d 417 (1st Dept. 1961). It is indeed the accepted principle that the law of the domicile of the decedent, that is, Lithuania, should be applied by this court. See 17B EST., POWERS & TRUSTS § 3-5.1(b)(2)(McKinney); In Re Rougeron's Estate, 17 N.Y.2d 264, 217 N.E.2d 639, 270 N.Y.S. 2d 578, cert. denied, 385 U.S. 899 (1966). However, to give recognition to the Certificate of Right as determinative /the rights of/ all the heirs to the decedent would approach, if not actually reach, a political act, since it would

affect persons and property located in countries other than Lithuania. See generally Zeiss Stiflung, supra at 900-01. This court cannot deny the reality that Lithuania does not, nor can it feasibly, determine the rights of heirs residing outside its borders. Therefore, its recognition is limited to that which is a private act, that is, to the determination of the heirs residing in Lithuania, and it will not affect this court's ability to give recognition to those heirs residing outside of Lithuania and who have satisfied this court as to the validity of their claim.

In this regard it should be noted that one Anna Walatkus, a resident of Baltimore, Maryland, has asserted that she is a daughter of Aniele Daniuniene and entitled to a one-quarter share of the fund. Such claim has been submitted by the defendant and, in letters by Mrs. Walatkus, addressed to the attention of this court. Although this court might be inclined to recognize this claim, there is no competent evidence on which such recognition could be based. The defendant did not seek to implead Mrs. Walatkus nor did he introduce any probative evidence to establish her claim. Therefore, this court is unable to find that she is entitled to participate in any distribution of the estate.

Sections 2218(2) and (3) of the Surrogate's Court Procedure Act provide as follows:

> 2. Where it shall appear that a beneficiary would not have the benefit or use or control of the money or other property due him or where other special circumstances make it desirable that such payment should be withheld the decree may direct that such money or property be paid into court for the benefit of the beneficiary or the person or persons who may hereafter appear entitled thereto. The money or property so paid into court shall be paid out only upon order of the court or pursuant to the order or judgment of a court of competent jurisdiction.

> 3. In any such proceeding where it is uncertain that an alien beneficiary or fiduciary not residing within the United States, the District of Columbia, the Commonwealth of Puerto Rico or a territory or possession of the United States would have the benefit or use or control of the money or property due him the burden of proving that the alien beneficiary will receive the benefit or use or control of the money or property due him shall be upon him or the person claiming from, through or under him.

The constitutionality of this statute has been upheld. Bjarsch v. DiFalco, 314 F.Supp. 127 (S.D.N.Y. 1970).

Since there is no applicable federal law, this court will apply the law of its situs, New York.[2] This statute "requires a showing by an alien beneficiary that the benefit, use or control of the property will not be denied [plaintiffs]. (Citation omitted)." Matter of Estate of Kolodij, 380 N.Y.S. 2d 610, 616, 85 Misc. 2d 946 (Sur. Ct. Monroe Co. 1976). At the conclusion of the trial day on June 21, 1978, this court directed that the issue of whether the plaintiffs will receive the benefit or use or control of the monies from the fund should be addressed when trial was resumed on August 28, 1978, since the defendant had placed this question in issue. Plaintiffs' counsel chose not to address the issue at trial, but did address it in its Additional Memorandum of Law. Annexed to this memorandum was an affidavit of the attorney who is the head of the Soviet law firm specializing in the interests of Soviet heirs in estates pending in other countries, a letter from the Department of State, and copies of certain regulations of "Vnesphosyltorg", the Soviet foreign trade organization. Although these exhibits arguably provide support for the position that the plaintiffs will receive the full use or benefit of the fund, such were not introduced into evidence at trial and cannot be considered by this court.

The authorities cited by counsel for the plaintiffs do support the proposition that citizens of the USSR, in general, receive use or benefit or control of monies distributed to them from foreign legacies. However, the attorney for the plaintiffs has submitted nothing to this court to establish that these particular plaintiffs will be able to control, use, or benefit from the monies in question. Even assuming this court could consider the letter from the Department of State, there has been no showing that these plaintiffs are so physically located, or otherwise capable of taking advantage of the monies, so as to make purchases through "Vnesphosyltorg".

Furthermore, in many of the cases cited by counsel, facts establishing that the actual legatees would receive use or control or benefit of the monies were presented to the court. In Matter of Lauraitis (File No. 2004-1153)(Surrogates Ct. Kings Co.) two visits from the President and officers of Inyerkollegiya, the foreign branch of the Moscow lawyer's collegium which represents Soviet citizens abroad, satisfied the court that Soviet citizens did receive the use or benefit of the funds and that the plaintiffs therein would receive similar treatment. In Re Saniule's Estate, 40 Misc. 2d 437, 243 N.Y.S. 2d 47 (Surrogates Ct. Ulster Co. 1963), aff'd., 21 App. Div. 2d 922, 251 N.Y.S. 2d 204 (3d Dept. 1964), the decision to release the monies was based upon various letters, including three from the petitioning distributees, establishing that the claimants would receive use or control or benefit from the monies. In In Re Danilchenko's Will, 69 Misc. 2d 665, 315 N.Y.S. 2d 153 (Surrogates Ct. Dutchess Co. 1970), aff'd., 37 App. Div. 2d 587, 323 N.Y.S. 2d 150 (2d Dept. 1971), aff'd., 30 N.Y. 2d 504, 329 N.Y.S.

2d 820 (1972), the decision followed extensive inquiry into the matter, including a visit of a Russian-speaking person to the USSR, who testified at trial.

Whether or not these plaintiffs will receive the use or benefit or control of the monies is a question of fact, not of law. Even if the cases cited by counsel for the plaintiffs satisfied this court that Soviet citizens generally have in the past received the use or benefit or control of foreign monies distributed to them, counsel has submitted nothing to this court establishing the continuation of this practice or that it will be applied to these Lithuanian plaintiffs. Similarly, no probative evidence has been introduced on behalf of the defendant to demonstrate his capacity to represent the claimants or to assure this court that he can place the fund in the hands of the heirs in Lithuania.

Therefore, this action is dismissed. The fund in question is to be retained by this court, pursuant to Section 2218 of the New York Surrogates Court Act, for the benefit of all those who may hereafter appear entitled thereto.

The question of whether the monies should be retained with or witout interest thereon must necessarily be addressed. Earlier in this litigation the plaintiff moved for summary judgment or, in the alternative, the payment by the defendant into this court /of/ the amount in question, plus interest /thereon/. Judge Werker reserved decision on the application for summary judgment and granted the request to have the defendant pay the sum in question, with interest, into this court. Judge Werker's order cited no authority for the requirement of interest and, indeed, apparently was granted only to allay the asserted fear of the plaintiffs that, should they

ultimately succeed herein, the fund would no longer be available. Plaintiffs' brief in support of the request to have the monies deposited with the court addressed only the defendant's acts which indicated that he could not reasonably be expected to comply with any ultimate order of this court, and contained no authority for the granting of interest. After ordering the payment of the fund, plus interest, into this court Judge Werker allowed the defendant to submit papers as to why the grant of interest was improper. Therefore, it would appear that the interest requirement was not determined to be the law of the case, but merely a procedural safeguard until a final determination could be made.

In order to gain control of the fund in question defendant's predecessor applied for and was granted a Treasury license. Such license provided that the fund was to be paid into the National City Bank of New York for credit to the blocked account of /the/ Consulate General of Lithuania as Trustee, a checking account. Pursuant to this license the defendant had to deposit the fund in a non-interest bearing account. However, defendant has made no showing as to any reason why such account could not have been interest-bearing. Under such circumstances he should be charged interest on the sum in question. See In Re Simenowitz Estate, 36 App. Div. 2d 760, 319 N.Y.S. 2d 575 (2d Dept. 1971); In Re Doyle's Will, 191 Misc. 860, 79 N.Y.S. 2d 695 (Surrogates Ct. Kings Co. 1948).

Plaintiffs' claims are dismissed. The monies in question should be deposited in this court, with interest thereon at the legal rate of interest for each year in question. Settle order on notice.

SO ORDERED:

Robert W. Sweet
U.S.D.J.

Dated: New York, New York
October 18, 1978

FOOTNOTES

1/ 28 U.S.C. § 1351 provides as follows:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of all actions and proceedings against consuls or vice consuls of foreign states.

2/ This court will not apply the law of Lithuania. There has been no submission of such law to this court. Furthermore, to apply the law of Lithuania, an unrecognized regime, in this instance would effectively be a political act.

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

No. 82-1966

ANICETAS SIMUTIS, individually and as Consul General of Republic of Lithuania at New York, New York,

Petitioner,

—against—

BORIS PRANAS DANIUNAS and AUGUSTINAS-VITAUTAS AUGUSTINOVICH MOREUNAS,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Should this Court grant *certiorari* to review the outcome of a pre-answer motion to dismiss which was not a final-determination?

2. Does New York, SCPA 2218 conflict with the doctrine of Federal supremacy in foreign policy areas?

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No. 82-1966

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This brief is submitted on behalf of the respondents in opposition to the petition, filed by the petitioner, who was the defendant-appellee below, for a writ of *certiorari* to review the judgment and decision of the United States Court of Appeals for the Second Circuit entered on March 18, 1983.

That judgment reversed the decision of the United States District Court for the Southern District of New York, which had held that a prior action between the parties had been concluded in such a manner as to be *res judicata* to further proceedings and that the respondents, who were the plaintiffs-appellants below, had imposed upon the petitioner and upon the Court to such an

extent that respondents' counsel was ordered to pay the petitioner's costs and his attorney's fees.

Statement of the Case

The case at bar, in which the petitioner seeks a writ of *certiorari*, had as its origins the Estate of John Daniunas, who died intestate in Maryland in 1931, leaving as his sole heir Aniele Daniuniene, citizen and resident of Lithuania.

An administrator was appointed in the Daniunas estate and from 1934 until 1945 he filed six accounts and made six distributions to the Consul General of Lithuania on behalf of the heir. (A-17)* The position of Consul General was held by two different successive individuals during this period, I. P. Zadeikis and Jonas Budrys. The present petitioner is their successor. (A-17)

The distributions made under the Fifth and Sixth Accounts were never sent to Aniele Daniuniene. The total amount, with the interest awarded by the District Court, is $5,598.15. The heir subsequently died in Lithuania leaving as her heirs the respondents who are citizens and residents of the Lithuanian SSR. (A-17)

The respondents brought suit against the petitioner in 1975 claiming entitlement to the estate funds he was holding. Throughout 1976 and most of 1977, pretrial discovery took place, including attempts by the petitioner to depose one Anna Walatkus, a resident of Baltimore, Maryland. (A-20) The petitioner had alleged that Walatkus was another heir of Aniele Daniuniene. (A-20) There were numerous unsuccessful attempts to depose Walatkus but no proof was ever presented to support the allegations

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* References are to Petitioner's Petition for Writ of Certiorari. The Petition is not numbered after page A-15. Respondent has treated those pages which follow A-15 as A-16 through A-26.

and this claim was never withdrawn or otherwise disposed of. (A-20)

A trial was held on June 21, 1978 before Judge Robert W. Sweet. The petitioner challenged the power of attorney which the respondents in Lithuania had issued to their New York counsel. This objection was overruled and the powers of attorney were ultimately recognized. (A-18)

The evidence of the devolution of Aniele Daniune's estate to her heirs was in the form of a fully authenticated Certificate of Right to Inherit. The petitioner objected to the authentication process on the grounds that the Certificate was an act of an unrecognized government. The objection was overruled and the Certificate was found to be determinative of the heirs who resided in Lithuania. (A-20) The District Court retained the "ability to give recognition to those heirs residing outside of Lithuania and who have satisfied this Court as to the validity of their claim." (A-20)

In connection with the Certificate of Right to Inherit the court also noted the aforementioned claim of Anna Walatkus. The court did not, however, reject the claim. Based upon the evidence (or lack thereof), the court was "unable to find that she is entitled to participate in any distribution of the estate" (A-20). This issue was never resolved.

The final objection raised by the petitioner was that the respondents would not enjoy the benefit, use and control of the funds. Since there was no applicable federal law and New York was the situs of the funds, the District Court applied New York's Surrogate's Court Procedure Act Section 2218 (hereinafter referred as "SCPA 2218"). (A-21) This objection was not raised until the trial before Judge Sweet. (A-21)

Both counsel addressed the issue of use, benefit and control in memoranda of law which were submitted to the court in July and August of 1978. The trial was concluded on August 28, 1978. Judge Sweet's opinion was rendered October 18, 1978. The court found that the Walatkus claim was unsubstantiated and the respondents' proof regarding benefit, use and control was not properly in evidence. The court did not totally reject any claim, however, finding that:

> The authorities cited by counsel for the plaintiffs do support the proposition that citizens of the USSR, in general, receive use or benefit or control of monies distributed to them from foreign legacies. However, the attorney for the plaintiffs has submitted nothing to this court to establish that these particular plaintiffs will be able to control, use, or benefit from the monies in question. Even assuming this court could consider the letter from the Department of State, there has been no showing that these plaintiffs are so physically located, or otherwise capable of taking advantage of the monies, so as to make purchases through "Vnesphosyltorg". (A-22)
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> Whether or not these plaintiffs will receive the use or benefit or control of the monies is a question of fact, not of law. Even if the cases cited by counsel for the plaintiffs satisfied this court that Soviet citizens generally have in the past received the use or benefit or control of foreign monies distributed to them, counsel has submitted nothing to this court establishing the continuation of this practice or that it will be applied to these Lithuanian plaintiffs. Similarly, no probative evidence has been introduced on behalf of the defendant to demonstrate his capacity to

represent the claimants or to assure this court that he can place the fund in the hands of the heirs in Lithuania." (A-23)

The action was dismissed. The monies were to be retained by the Clerk of the District Court ". . . pursuant to Section 2218 of the New York Surrogate's Court Act for the benefit of all those who may hereafter appear entitled thereto". (A-23)

A judgment was thereafter entered which contains the words "Plaintiffs take nothing" and further specifies that the fund be held by the Clerk of the Court for the "Consulate General of Lithuania, as Trustee and Attorney-In-Fact for Mrs. Aniele Daniuniene, a national of Lithuania and designated as a blocked account under Executive Order 8389, as amended, and the regulations of the United States Treasury Department, and that the fund not be released until specific United States Treasury licenses have been obtained and filed with the court." Nowhere in the opinion can this language be found. Such a result is not even intimated. The opinion clearly states that the retention of the funds was simply for *'all those who may hereafter appear entitled thereto.'* (emphasis added). The Court of Appeals has agreed that this was the intended result. (A-3)

In January of 1981 the petitioner initiated correspondence with the Clerk of the District Court to ascertain the place of deposit of the funds. No copies of this, or the ensuing correspondence were ever sent to counsel for the respondents. The result of the correspondence was the entry of an *ex parte* order on December 16, 1981 directing payment of the funds to "Anicetas Simutis, Consul General of Lithuania, as Trustee and Attorney-In-Fact for Mrs. Aniele Daniuniene." (A-7). This order was obtained even though it is clear from Judge Sweet's opinion that

"The sole heir of John Daniunas was Aniele Daniuniene, who died intestate in Lithuania". (A-17)

Following the receipt of the order of December 16, 1981, an action was commenced against Anicetas Simutis for the recovery of the funds by service of a summons and complaint dated April 7, 1982. As the petitioner had regained control over the funds this action was the only remedy respondents had to show to the District Court that they were the parties entitled thereto.

The petitioner answered the complaint with a general denial and the affirmative defense that the dismissal of the prior action had the effect of *res judicata*. This affirmative defense was made the ground for a motion to dismiss which resulted in the opinion of Judge Edelstein dated October 19, 1982 and the order of dismissal and judgment entered November 9, 1982 which was the subject of the respondents' appeal to the United States Court of Appeals for the Second Circuit.

The Proceedings Below

A. *The District Court.*

In its Memorandum Opinion dated October 19, 1982, the District Court granted the petitioner's motion to dismiss on the grounds of *res judicata*. The Court found that the same plaintiffs had brought an action against the same defendant to recover the same funds. The Court further found that there had been no change of facts since the prior dismissal and that the plaintiffs had no basis for the filing of a new suit.

The District Court also found that the plaintiffs had imposed upon the Court and the defendant; that the defendant had been harassed by the suit; and that the defendant had wasted money answering a frivolous suit. The

court dismissed the action and ordered the counsel for the plaintiffs to pay the reasonable costs of the action, including the defendant's attorney's fees.

B. *The Court of Appeals.*

The Court of Appeals found that the prior case tried by Judge Sweet had not resulted in final determination on all of the merits and that Judge Sweet had not intended his judgment to bar relitigation over entitlement to the fund. The Court found that New York's SCPA 2218 was the law of the case as far as the issue of benefit, use and control was concerned and, furthermore, that this finding created no conflict with the licensing requirements of the Trading with the Enemy Act.

Finding that the prior action was not *res judicata,* the Court of Appeals reversed the judgment of Judge Edelstein and remanded the case back to the District Court for further proceedings.

Reasons for Denying the Writ

Certiorari should be denied in this case. The determination by the Court of Appeals was not final. SCPA 2218 is not an unconstitutional intrusion into the area of foreign affairs.

1. *The Court of Appeals Has Not Made a Final Determination in This Case.*

The petitioner is asking this Court to review the outcome of a pre-answer motion to dismiss. The Court of Appeals remanded the case to the District Court for further litigation and "it is not yet ripe for review by this Court", *Brotherhood of Locomotive Firemen and Enginemen* v. *Bango & Aroostock R.R. Co.,* 389 U.S. 327 (1967) at 368.

If, as petitioner argues, Judge Sweet erred in applying New York's SCPA 2218, the time for appellate review is after a final determination has been made. Denial of the petition seeking permission to appeal this interlocutory decision will not in any way act as "an affirmance of the decree that is sought to be reviewed." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U.S. 251 (1916), at 271.

The Court is being asked to review a denial (by the Court of Appeals) of a motion to dismiss. Such a review is premature as this Court has said:

> "Had this motion been granted and judgment of dismissal been entered, clearly there would have been an end of the litigation and appeal would lie within Section 128. United States v. Marin, 9 Cir., 136 F.2d 388. But denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable. Cf. Roche v. Evaporated Milk Ass'n, *319 U.S. 21, 63 S.Ct. 938, 87* L.Ed. 1185. See also Dieckmann v. United States, 7 Cir., 88 F.2d 902. Certainly this is true whenever the question may be saved for disposition upon review of final judgment disposing of all issues involved in the litigation or in some other adequate manner."

Catlin v. *United States,* 324 U.S. 229 (1945) at 236.

2. *SCPA 2218 Does Not Unconstitutionally Intrude Into the Area of Foreign Affairs.*

It was the petitioner himself who raised the issue of benefit, use and control during the trial. (A-21) Judge Sweet, correctly noting that there is no specific federal statute dealing with the subject of benefit, use and control, applied the law of the situs of the funds, New York's SCPA 2218. (A-21) The relevant portion of that statute reads as follows:

"(2) Where it shall appear that a beneficiary would not have the benefit or use or control of the money or other property due him or where other special circumstances make it desirable that such payment should be withheld the decree may direct that such money or property be paid into court for the benefit of the beneficiary or the person or persons who may thereafter appear entitled thereto. The money or property so paid into court shall be paid out only upon order of the court or pursuant to the order or judgment of a court of competent jurisdiction."

The petitioner's contention that SCPA 2218 unconstitutionally intrudes into the area of foreign affairs by restricting or modifying Executive Order 8389, as amended, issued pursuant to the Trading with the Enemy Act, 40 U.S. Stat. 411, Section 5(b), 31 U.S.C. 520, is without merit.

SCPA 2218 and the Trading with the Enemy Act have different objectives not inconsistent with each other. SCPA 2218 represents an expression of the state's public policy to protect the integrity of estate distributions and to implement the intent of testators. It seeks to make certain that distributees will have use, benefit and control of the property inherited by them. The Trading with the Enemy Act and Executive Order 8389 have nothing to do with the question of who is entitled to estate funds between contesting parties or whether a distributee will receive the benefit, use and control of his or her funds. It expresses the policy of the Federal Government, based on foreign policy considerations, that under certain circumstances property of any kind belonging to a national of designated foreign countries will be blocked and can be transferred only upon the issuance of a license.

As has been pointed out by the United States Treasury Department, the Trading with the Enemy Act contemplates

that where there is a dispute over entitlement as between two parties, that issue is to be resolved by the Judicial Branch of the Government—in this case, the Federal Judiciary applying state law. The Treasury Department's letter was cited by the Court of Appeals in ordering remand of this case to the District Court. (A-2, 3) It pointed out that upon presentation to the District Court of sufficient evidence to establish use, benefit and control the petitioner would obtain the necessary Treasury license to withdraw the funds. Thus, there is neither inconsistency between the federal and state statute nor does the state intrude into the area of foreign affairs.

This Court has never found that SCPA 2218, on its face, unconstitutionally intrudes into the federal domain of foreign affairs. *See, Clark* v. *Allen,* 331 U.S. 503 (1947); *Zschernig* v. *Miller,* 389 U.S. 429 (1968). A three-judge court of the United States District Court for the Southern District of New York interpreted the effect of this Court's decisions as follows:

> "The Clark and Zschernig decisions together can be construed to mean that statutes restricting the rights of alien beneficiaries to receive inheritances of United States citizens do not inherently constitute an intrusion into the foreign affairs area. At the same time, in applying such statutes, whether the law be a reciprocity provision or a benefit, use and control provision, they appear to warn the state courts not to inquire into or evaluate the administration of foreign law, or the credibility and policies of foreign governments. Thus, a court is limited to a 'routine reading' of a foreign country's laws or a 'just matching' of such laws with the laws of the state involved. Zschernig v. Miller, supra, 389 U.S. at 433, 88 S.Ct. 664; see Matter of Kish, 52 N.J. 454, 246 A.2d 1 (1968);

Note, Alien Succession under State Law: The Jurisdictional Conflict 20 Syr. L.Rev. 662, 673 (1969); Note, Foreign Affairs—Decedents' Estates, 3 Int'l Lawyer 701 (1969)."

Bijarsch v. *Difalco,* 814 F. Supp. 127, 133 U.S.D.C. N.Y. (1970).

Also, subsequent to this Court's decision in *Zschernig,* the Court of Appeals of the State of New York upheld the constitutionality of SCPA 2218. *Matter of Leikind,* 292 N.Y.S.2d 681, 685, 22 N.Y.2d 346, 351 (1968).

In any event, there has been no definitive application of SCPA 2218 to the facts of this case. All that has happened is that the Court of Appeals has remanded the case to the District Court so that the issue of benefit, use and control should be finally resolved. In doing so, it suggested to the District Judge, whose decision it reversed, that he might consider it be appropriate to refer the case to the original trial judge. (A-3) That reference has been made.

Although it was not an issue before the Court of Appeals, and is not a question raised on this appeal, petitioner argues that the decision of the District Court in recognizing for limited purposes a Certificate of Right to Inherit issued in Lithuania, gave credence to a political act of an unrecognized government, thus violating the doctrine of federal supremacy. That contention also lacks merit. Consistent with well-established precedents, Judge Sweet held that "A review of the documents submitted has satisfied this court that the Certificate of Right was properly authenticated in accordance with the laws of Lithuania. The authorities of the plaintiffs are persuasive as to the recognition to be given a private, as opposed to a political, act of an unrecognized sovereign. *In re Luberg's*

Estate, 19 App. Div. 2d 370, 243 N.Y.S.2d 747 (1st Dept. 1963); *see* generally, *Upright* v. *Mercury Business Machines Co.,* 13 App. Div. 36, 213 N.Y.S.2d 417 (1st Dept. 1961)." (A-19)

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Second Circuit should be denied.

Dated: New York, New York
June 28, 1983

Respectfully submitted,

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